STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
(Murphy, P.J., Cooper and Kelly, J.J.)

MARGARET JENKINS, as Personal Representative of the ESTATE OF MATTIE HOWARD, Deceased,

Plaintiff-Appellee,

-vs-

JAYESH KUMAR PATEL, M.D. and COMPREHENSIVE HEALTH SERVICES, INC., a Michigan corporation d/b/a THE WELLNESS PLAN, jointly and severally,

Defendants-Appellants.

_____/

Supreme Court No. 123957

Court of Appeals No. 233116

Wayne County Circuit Court
No. 98-808834-NH

BRIEF ON APPEAL BY MARGARET JENKINS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MATTIE HOWARD, DECEASED

****ORAL ARGUMENT REQUESTED****

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STATEMENT REGARDING JURISDICTION

Plaintiff-Appellee acknowledges and agrees with Defendants-Appellants' Statement regarding the appellate jurisdiction of this Court. Plaintiff-Appellee acknowledges that this Court has jurisdiction pursuant to MCR 7.301 and MCR 7.302.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I

DID THE SUCCESSOR TRIAL COURT JUDGE, HONORABLE GERSHWIN DRAIN, COMMIT REVERSIBLE ERROR BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR REMITTITUR OR, IN THE ALTERNATIVE, FOR NEW TRIAL?

Defendants Jayesh Kumar Patel, M.D. and Comprehensive Health Services d/b/a The Wellness Plan submit the answer is "Yes."

Plaintiff asserts the answer is "No."

The Court of Appeals held the answer is "Yes."

II

IS THE JURY VERDICT AWARD OF TEN MILLION DOLLARS IN THIS CASE SO CLEARLY EXCESSIVE AS TO HAVE COMPELLED THE SUCCESSOR JUDGE TO HAVE REDUCED IT?

Defendants Jayesh Kumar Patel, M.D. and Comprehensive Health Services d/b/a The Wellness Plan submit the answer is "Yes."

Plaintiff asserts the answer is "No."

The trial court held the answer is "No."

The Court of Appeals held the answer is "Yes."

III

DOES THE CAP ON NON-ECONOMIC DAMAGES AS SET FORTH IN MCL 600.1483 APPLY TO CASES OF MEDICAL MALPRACTICE BROUGHT PURSUANT TO MICHIGAN'S WRONGFUL DEATH ACT, MCL 600.6922?

Defendants Jayesh Kumar Patel, M.D. and Comprehensive Health Services d/b/a The Wellness Plan submit the answer is "Yes."

Plaintiff asserts the answer is "No."

The trial court held the answer is "No."

The Court of Appeals held the answer is "No."

IV

IS MCL 600.1483 CONSTITUTIONAL?

Defendants Jayesh Kumar Patel, M.D. and Comprehensive Health Services d/b/a The Wellness Plan submit the answer is "Yes."

Plaintiff asserts the answer is "No."

The trial court did not answer this question.

The Court of Appeals did not answer this question.

V

IF THE SUPREME COURT WERE TO APPLY THE LOWER CAP FOR NON-ECONOMIC DAMAGES UNDER MCL 600.1483 TO CASES OF MEDICAL MALPRACTICE RESULTING IN DEATH, ESPECIALLY UNDER CIRCUMSTANCES WHERE A PATIENT WOULD OTHERWISE HAVE FALLEN WITHIN THE SPECIFICALLY ENUMERATED CATEGORIES OF MCL 600.1483, WOULD SUCH AN APPLICATION VIOLATE THE EQUAL PROTECTION CLAUSE OF THE MICHIGAN CONSTITUTION, CONST. 1963, ART. I, §2?

Defendants Jayesh Kumar Patel, M.D. and Comprehensive Health Services d/b/a The Wellness Plan will presumably assert the answer is "No."

Plaintiff asserts the answer is "Yes."

The trial court did not address this issue.

The Court of Appeals did not address this issue.

STATEMENT OF FACTS

This was a wrongful death medical malpractice action brought pursuant to MCLA 600.6922 in which it is alleged that Defendant, Dr. Patel, acting as an employee of Co-Defendant, The Wellness Plan (CHS), failed to adequately treat and control Plaintiff decedent's chronic hypertension and renal insufficiency which ultimately led to end stage renal disease and ultimately to the death of Mattie Howard. In December of 1991, Mattie Howard suffered a cerebral vascular accident (stroke) and was hospitalized for approximately eight days. Testing showed that she had already suffered some kidney failure and that diagnosis was made. She was hospitalized for approximately eight days and subsequently transferred to the Rehabilitation Institute of Detroit where she received additional in-patient care. Upon her discharge in mid-January, 1992, Mattie Howard went to live with one of her daughters in Virginia and remained there until April of the same year.

On May 21, 1992, Mattie Howard was seen by Dr. Patel at CHS for the first time. As part of the initial examination and follow-up, Dr. Patel had Plaintiff's decedent sign authorizations to receive her medical records relative to her prior treatment. He ordered and received the results of routine laboratory tests and the hypertension profile. He ordered additional tests including liver and kidney profiles, an echocardiogram, etc. The results of these tests further confirm that Mattie Howard was suffering from significant renal impairment.

Despite these test results and numerous follow-up visits with Dr. Patel, the Defendant failed to aggressively treat Ms. Howard's renal disease and hypertension. Over the next eighteen (18) months, Dr. Patel's medical records confirm, and his testimony indicated, that on numerous occasions Plaintiff's decedent had significantly elevated blood pressure, a sign that his treatment, or lack thereof, failed to bring Plaintiff's decedent's blood pressure under control.

It was not until December 6, 1993, approximately eighteen (18) and one-half months after her initial visit, that Dr. Patel ordered an immediate referral for a nephrologist consultation.

In August, 1994, Mattie Howard began dialysis treatment at Henry Ford Hospital and ultimately in November of 1995, she was admitted to Sinai Hospital where she deceased as the direct result of her uncontrolled hypertension and renal failure, both of which led to cardiac arrest and her ultimate demise.

Plaintiff, as Personal Representative of the Estate, filed the instant action on March 20, 1998. Trial began before the Honorable Marianne O. Battani on Monday, May 15, 2000. The proofs concluded on Thursday, May 18, 2000 and the jury was instructed and deliberated on May, 19, 2000. After approximately three and one-half hours of deliberation, the jury returned a verdict of Ten Million ($10,000,000.00) Dollars.

Defendants filed post-judgment motions seeking application of the cap, remittitur or a new trial. On February 6, 2001, successor judge Honorable Gershwin Drain ruled on the post-judgment motions holding that the cap on non-economic damages did not apply to wrongful death claims and further denying the Defendants' motions for remittitur and/or a new trial.

Defendants appealed to the Michigan Court of Appeals. In a published Opinion, which was unanimous with the Honorable Kirsten Frank Kelly concurring in a separate opinion, the Court held that the damage cap did not apply to actions alleging medical malpractice, but also held that the Trial Court was bound to attempt to determine an amount for remittitur pursuant to MCR 2.611. The Court of Appeals further held that if the Trial Court could not determine an amount for remittitur, but still believed the verdict to be excessive, that any new trial would have to be limited to damages only.

ARGUMENT AND LEGAL ANALYSIS

I DID THE SUCCESSOR TRIAL COURT JUDGE, HONORABLE GERSHWIN DRAIN, COMMIT REVERSIBLE ERROR BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR REMITTITUR OR, IN THE ALTERNATIVE, FOR NEW TRIAL?

II IS THE JURY VERDICT AWARD OF TEN MILLION DOLLARS IN THIS CASE SO CLEARLY EXCESSIVE AS TO HAVE COMPELLED THE SUCCESSOR JUDGE TO HAVE REDUCED IT?

Inasmuch as the Statement of Questions Presented by all parties to this action include issues regarding the amount of the Judgment and whether or not the Judgment was clearly excessive, they will be discussed together.

THE VERDICT OF TEN MILLION ($10,000,000.00) DOLLARS WAS NOT AGAINST THE GREAT WEIGHT OF THE EVIDENCE AND NOT GROSSLY EXCESSIVE

MCR 2.611(E)(1) governs motions for remittitur. According to the express language of MCR 2.611(E)(1), a remittitur is justified only if the jury verdict is "excessive," to wit, greater than the "highest amount the evidence will support." See also: *Palenkas v. Beaumont Hospital*, 432 Mich App 527; 443 NW2d 354 (1989); *Carpenter v. Consumers Power Co.*, 230 Mich App 547 (1998); *Szymanski v. Brown*, 221 Mich App 423; 562 NW2d 212 (1997); *May v. Beaumont Hospital*, 180 Mich App 728; 488 NW2d 497 (1989); *Wilson v. GM*, 183 Mich App 21; 454 NW2d 505 (1990); *Frohman v. Detroit*, 181 Mich App 400; 450 NW2d 59 (1989). The Michigan appellate courts have stressed that the remittitur process must be approached with caution: generally, awards for personal injury rest within the sound judgment of the trier of fact. Indeed, jury verdicts may not be disturbed where the amount awarded falls within the range of the evidence and within the limits of what reasonable minds would deem just compensation for the injury sustained. *Palenkas*, *supra*;

Frohman, *supra*; *Stachurski v. K-Mart*, 180 Mich App 564; 447 NW2d 830 (1989), lv den; *May*, *supra*.

When evaluating whether a jury award is excessive, a trial court may only consider:

1. Whether the verdict is supported by the proofs at trial;

2. Whether the verdict was a result of improper methods, passion, prejudice, partiality, sympathy, corruption or mistake of law or facts;

3. Whether the verdict was within the limits of what reasonable minds would deem just compensation for the injuries sustained; and

4. Whether the amount actually awarded is comparable to awards in similar cases within the state and other jurisdictions.

Palenkas, *supra*, at pp. 531-532; *May*, *supra*, at 732-738.

The *Palenkas* court deliberately limited a trial court's inquiry to objective considerations relating to trial proceedings and the evidence adduced. Id at p. 532. The courts reasoned that objective considerations are potentially verifiable in the written record, and therefore, provide a workable basis for appellate review. Id at pp. 532-533; *Wilson*, *supra*; *May*, *supra*.

While the court's inquiry should be limited to objective considerations relating to the proofs at trial, the Court must consider evidence of pain and suffering experienced by the decedent. *Phillips v. Magda Motor Mfg.*, 204 Mich App 401; 516 NW2d 502 (1994); *Phinney v. Perlmutter*, 222 Mich App 513; 564 NW2d 532 (1997).

In so ruling, the Michigan Supreme Court abandoned the "shock the judicial conscious" test previously employed in such cases as *Precopio v. City of Detroit*, 415 Mich 457, 465; 330 NW2d 802 (1982); *Stevens v. Edward C. Levy Company*, 376 Mich 1, 5; 135 NW2d 414 (1965); *Jones v. Sanilac County Road Commission*, 128 Mich App 569, 592; 342 NW2d 532 (1983); *Quade v.*

Hartfield Enterprises, Inc., 180 Mich App 704, 706; 326 NW2d 343 (1982); *Tomie v. Bloom Associates, Inc.*, 75 Mich App 661, 670; 255 NW2d 727 (1977); *Pippen v. Denison Division of Abex Corporation*, 66 Mich App 664-675; 239 NW2d 704 (1976), lv den, 399 Mich 823 (1977). The Michigan Supreme Court in *Palenkas*, *supra*, held that the "shock the conscious" inquiry is no longer an appropriate one, because it is completely subjective, involving a trial court's personal values and beliefs which in no way relates to the actual trial proceedings and evidence. Id. See also: *Wilson*, *supra*; *Stachurski*, *supra*; *McAtee v. Guthrie*, 182 Mich App 215, 223; 451 NW2d 551 (1989).

Contrary to the Defendants' representations, recent developments in Michigan's remittitur law do not evidence a trend to encourage trial courts to reduce large jury awards.

It should be noted that the *Palenkas* court established a very strict standard of review:

> **"In our view, the question of the excessiveness of a jury verdict is generally one for the trial court in the first instance. The trial court, having witnessed all the testimony and evidence as well as having the unique opportunity to evaluate the jury's reaction to the proofs and to the individual witnesses, is in the best position to make an informed decision regarding the excessiveness of the verdict."**

The Court went on to say that the only consideration expressly authorized by MCR 2.611(E)(1) is whether the jury award is supported by the evidence. Any inquiry should be limited to objective consideration relating to the actual conduct of the trial or to the evidence produced.

Defendants argue that the verdict is excessive because of the limited life expectancy of Plaintiff's decedent. Nothing could be further from the truth. At the time of her death, Mattie Howard was almost sixty-nine (69) years of age. The jury was instructed that she had a statutory life expectancy of approximately thirteen (13) years. No testimony was presented by the defense to establish that her life expectancy was shorter. Furthermore, Plaintiff's expert, Dr. Baskin, testified

that he routinely kept patients alive on dialysis for periods in excess of ten (10) to twenty (20) years. The defense failed to present a single witness to contradict that testimony by Dr. Baskin. In fact, on the issue of damages, the defense presented little or no evidence to rebut the claims of Plaintiff.

Defendants suggest that their examination of other cases brought pursuant to the wrongful death statute indicate that the verdict in this case is excessive. Yet, the Defendants are quick to admit that none of the cases cited in Defendants' Brief are even similar factually to the case at bar. Of the three specific cases mentioned by Defendants, in one case the plaintiff's decedent was survived by two children; in the other two cases, there is no mention of any survivor's loss.

In the case at bar, there were fifteen (15) very good reasons why the verdict was not excessive and is supported by the great weight of the evidence. They are the fifteen (15) surviving siblings and children of Plaintiff's decedent. Plaintiff's counsel presented rather compelling testimony from family members Melody Howard Scott, Byron Howard, Dixie Hill, Richard Jenkins, and Margaret Jenkins. The successor Judge, unfortunately, did not have the opportunity of hearing their testimony nor observing their demeanor. They talked, in chilling detail, of their fondest moments with Plaintiff's decedent.

A court should be reluctant to disturb a jury verdict for personal injuries upon the ground that the amount is excessive. *McKay v. Hargis*, 351 Mich 409. In evaluating a jury verdict for possible remittitur, a court should review the verdict in the light most favorable to the plaintiff. *Stowers v. Wolodzko*, 396 Mich 119.

Lastly, Defendants argue that Plaintiff implemented inflammatory and inappropriate argument. It should be noted that Defendants fail to cite a single case from this or any other jurisdiction supporting this contention. In fact, it was defense counsel who brought this upon

himself. Attached as **Exhibit 1** are pertinent portions of defense counsel's closing argument in which he made reference to the "silent doctors." Counsel was attempting to argue that medical records from Dr. Arnold Singerman, Sinai Hospital, Rehabilitation Institute, Henry Ford Hospital, and a "doctor from Virginia" all supported the Defendants' contentions that the standard of care had not been breached by Dr. Patel. It was therefore appropriate for Plaintiff's counsel to address these arguments in rebuttal argument. Attached as **Exhibit 2** are pertinent portions of the rebuttal argument addressing the statements of defense counsel. Defense counsel never objected to any of this rebuttal. He cannot now raise an issue which he failed to raise during the trial.

Defendants-Appellants argue the verdict in this case was the product of passion and prejudice. They argue in support thereof, that three jurors were excused by the trial court during voir dire and that although other jurors denied such bias, the likelihood of prejudice was clear. However, trial counsel never challenged the jury panel as a whole, nor did he raise any argument in the trial court with respect to the selection of the jury. Having failed to raise this issue in the trial court, he is now precluded from doing so.

Defendants-Appellants also argue that the verdict must have been a result of the racial disparity between the individual Defendant Dr. Patel and his African-American patients, and they cite questioning by Plaintiff's counsel in support of that argument. Once again, defense counsel never objected to any of this cross-examination, and he cannot now claim error after having remained silent.

Defendants-Appellants also argue, without any support for said argument, that Plaintiff's counsel somehow urged the jury to render a "lottery-like" award. A clear reading of the trial transcript once again indicates that defense counsel never objected to any of this argument. Even

had he done so, there was nothing improper about it.

This state has a longstanding rule that no error is preserved for review where no objection is made during the course of a trial, and no ruling made thereupon by the trial court. *People v. Humacher*, 432 Mich 157, 168-169; 438 NW2d 43 (1989); *Taylor v. Lowe*, 372 Mich 282; 126 NW2d 104 (1964); *Byrne v. Schneider's Iron, Inc.*, 190 Mich App 176, 184; 475 NW2d 854 (1991); *Harrigan v. Ford Motor Co.*, 159 Mich App 776, 786; 406 NW2d 917 (1987), appeal dismissed. In the seminal *Taylor* case, the Michigan Court expressed this basic rule as "no objection - no ruling - no error presented." *Taylor, supra*, at 283.

According to the *Taylor* Court, this principle of appellate procedure must be applied regardless of the fact that the consequence of trial counsel's failure to object should be visited upon the client-litigant. Id at 284. The rationale for the restrictive tenet is two-fold.

First, as the *Taylor* Court noted, reviewing courts can never known when the omission of a timely objection is tactical and when it is slothful or negligent. Id. Hence, the courts are bound to assume that, where the trial counsel has failed to object, he has elected to gamble that the jury will return a favorable verdict for his client. Id. The *Taylor* Court concluded that, when trial counsel takes such risks and loses, counsel may not later complain about errors that might have been prevented or corrected by the trial court, had counsel not sat on his hands:

> . . . Thus, does this court continue to rule that counsel may not stand by, electing as we must assumed to 'take his chances on the verdict of the jury' (citation omitted) and then raise questions which could have and should have been raised in time for corrective judicial action. (*Taylor, supra*, at p. 284.)

Additionally, the *Taylor* Court opined that interests of judicial economy compel consistent enforcement of the precept of "no objection - no ruling - no error." Here, the Court stressed that

litigation would never end if litigants were entitled to seek reversal on issues where no objection, and therefore, no ruling, were available for review. Id.

A corollary to the rule of "no objection - no ruling - no error presented" is that, objections to a ruling that admits or excludes evidence which are based on one ground are insufficient to preserve an appellate attack based on different grounds. *People v. Michael*, 181 Mich App 236; 448 NW2d 786 (1989); *In Re Davis*, 166 Mich App 735, 738; 420 NW2d 872 (1988). Additionally, a party waives appellate review of arguments that the trial court failed to properly instruct the jury, where no objection was made concerning the lack of instruction at trial. *Johnson v. Corbet*, 423 Mich 304; 377 NW2d 713 (1985); *Hickey v. Zezulka*, 177 Mich App 606; 443 NW2d 180 (1989), lv granted 435 Mich 861; 457 NW2d 345 (1990); *Bonelli v. Volkswagen of America, Inc.*, 166 Mich 483.

Defendants have suggested that an evaluation of comparable verdicts confirms the excessiveness of the non-economic award in this case. Nothing could be further from the truth.

In the case of *Scott Amadure v Warner Brothers*, Oakland County Circuit Court Case No. 95-494536-NZ, the jury returned a verdict of slightly more than Twenty-Five Million ($25,000,000.00) Dollar for the wrongful death of a 36-year-old male who was survived by his parents and five siblings. In the case of *Milomir Tomic, Personal Representative of the Estate of Gary Tomic v St. Johns Hospital*, Wayne County Circuit Court Case No: 94-405556-NH, the jury returned a verdict of Fourteen Million ($14,000,000.00) Dollars for the wrongful death of a 28-year-old homosexual. In the case of *VanEizenga v Chrysler Corporation*, Kent County Circuit Court Case No: 92-78244-NI, the jury returned a verdict in the amount of Eight Million Three Hundred Thousand ($8,300,000.00) Dollars for the wrongful death of a female who was survived by her husband and

three minor children. In *Estate of Linville v Montgomery Elevator Co*, Wayne County Circuit Court Case No: 90-012726-NO, the jury returned a verdict of Eight Million ($8,000,000.00) Dollars for the wrongful death of a 27-year-old male survived by his wife, one child, his mother and an unknown number of siblings. In the case of *Estate of Phillips v Mercy Health Center*, Wayne County Circuit Court Case No: 96-611858-NH, the jury returned a verdict of more than Seven Million ($7,000,000.00) Dollars for the wrongful death of an infant survived by his parents, grandparents and one sibling. In the case of the *Estate of Rogers v City of Detroit, et al.*, Wayne County Circuit Court Case No: 90-016936-NO, the jury returned a verdict of 6.2 Million ($6,200,000.00) Dollars for the wrongful death of a 34-year-old male survived by his pregnant wife and one child. EXHIBIT 7

III THE CAP ON NON-ECONOMIC DAMAGES AS SET FORTH IN MCL 600.1483 DOES NOT APPLY TO ACTIONS BROUGHT UNDER THE WRONGFUL DEATH STATUTE, MCLA §600.2922.

A. INTRODUCTION - PERTINENT STATUTES

1. Wrongful Death Statute MCLA §600.2922

Michigan's Wrongful Death Statute, MCLA §600.2922, states in pertinent part:

> (1) Liability of Tort-feasors; **exclusiveness of remedy**
> Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who . . . would have been liable, if death had not ensued, shall be liable to an action for damages. . . .
>
> (6) **In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable . . . compensation** for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and **damages for the loss of financial support and the loss of the society and companionship of the deceased**. . . .

MCLA §600.2922.

2. Medical Malpractice Act Damage Cap MCLA 600.1483

Prior to April, 1994, a plaintiff alleging medical malpractice could not recover more than Two Hundred Twenty-Five Thousand ($225,000.00) Dollars unless his/her injury met one of several exceptions. If the party met one of the exceptions, one of which was death, the party's recovery was not limited. MCLA §600.1483 (October, 1986).

The legislature amended §1483, effective April of 1994, to state in pertinent part:

> (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for non-economic loss recoverable by all plaintiffs, resulting from the negligence of all defendants shall not exceed $200,000 unless, as a result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply, as determined by the court pursuant to section 6304, in which case damages for non-economic loss shall not exceed $500,000;
>
> (a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:
> (i) Injury to the brain;
> (ii) Injury to the spinal cord;
> (b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal daily living; or
> (c) There has been permanent loss or damage to a reproductive organ resulting in the inability to procreate. . . .
>
> (3) As used in this section, non-economic loss means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other non-economic loss.

MCLA §600.1483 (1994). These amounts have been increased pursuant to the consumer's price index.

B. THE WRONGFUL DEATH ACT IS THE EXCLUSIVE REMEDY IN WRONGFUL DEATH CASES.

1. Michigan law indicates that the Wrongful Death Act is the exclusive remedy in wrongful death cases.

The first paragraph of the Wrongful Death Act is entitled, "Liability of Tort-feasors; **exclusiveness of remedy**." (MCLA 600.2922(1).) Moreover, MCLA 600.2921 indicates that **all** death cases must be prosecuted pursuant to the Wrongful Death Act. MCLA 600.2921 states:

> All actions and claims survive death. **Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to the next section**. [MCLA 600.2922] If an action is pending at the time of death, the claims may be amended to bring it under the next section. **A failure to so amend will amount to a waiver of the claim for additional damages resulting from death**.

MCLA 600.2921.

Thus, pursuant to MCLA 600.2921, a death case **must** be filed pursuant to the Wrongful Death Act. In the event that the injured party files suit pursuant to another statute then dies during the course of the litigation, the decedent's estate cannot claim damages for the death unless the estate amends the complaint to conform with the Wrongful Death Act. **In other words, a plaintiff's estate cannot seek "death" damages to the medical malpractice statute or any other statute.**

In keeping with these provisions, the Michigan Supreme Court has found that the Wrongful Death Act is the exclusive remedy in wrongful death cases. In *Courtney v. Apple*, 345 Mich 223, 76 NW2d 80 (1956), the Michigan Supreme Court stated:

> In considering this question, it must be borne in mind that the right to recover damages for wrongfully causing a death rests wholly on the statute. **The remedy under the death act, above cited, is exclusive and the recovery of damages is necessarily limited to those specified by the legislature** and sustained by proofs.

Courtney, 76 NW2d at 83.

Numerous circuit courts found that the Wrongful Death Act is the exclusive remedy available to wrongful death litigants, and as such, **that the medical malpractice damage caps do not apply in wrongful death cases**.

In *Milicia v. Children's Hospital of Michigan*, Wayne County Circuit Case No. 97-724277-NH (Ziolkowski, J), the court stated:

> **The Wrongful Death Act stands upon its own as providing the exclusive measure of damages in a death action including allowable damages not included in MCL 600.1483. The Wrongful Death Act contains no statutory cap and was not amended by Tort Reform legislation.**

[**Exhibit 3**, *Milicia*, p. 2].

Likewise, in *Christoff v. Kwakuvi*, Hillsdale County Circuit Court, Case No. 98-28969-NH (Smith, J), the court stated:

> Again, for this Court's belief [sic], **the legislature has sent a clear signal that the wrongful death statute is the exclusive remedy for damages** of this nature.

[**Exhibit 4**, *Christoff*, pp. 22-23]. The *Christoff* court went on to order:

> **The Court finds that the caps on non-economic damages in medical malpractice cases set forth in MCL 600.1483 do not apply in wrongful death actions** for the reasons stated on the record.

[**Exhibit 5**, Order Regarding Applicability of Medical Malpractice Caps].

In *Townsend v. Mercy Health Center*, Wayne County Circuit Court (Thomas, J), the court found that the medical malpractice damage caps do not apply in wrongful death cases.[1] [**Exhibit 6**].

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[1] Plaintiff was unable to obtain a copy of Judge Thomas' decision. Plaintiff relies on the Michigan Bar Journal article, "The Two-Tiered Cap on Non-Economic Damages in Medical Malpractice Cases: A Legislative "Solution" Creates Myriad Problems for the Courts" by Anne M. Schoepfle and Cameron R. Getto (June 1999, pg. 562, fn. 32). [Exhibit 6]

2. The Court of Appeals correctly reasoned that Section 1483 does not apply to the WDA.

The Court of Appeals issued its decision on April 1, 2003. *Margaret Jenkins, Personal Representative of the Estate of Mattie Howard, Deceased v. Jayesh Kumar Patel, M.D. and Comprehensive Health Services, d/b/a The Wellness Plan*, 256 Mich App 112, 662 NW2d 453.

The Court of Appeals noted that where reasonable minds differ concerning the meaning or interpretation of a statute, judicial construction is appropriate. *Jenkins* at p. 456 (citing *Slater v. Ann Arbor Pub Schools Bd. of Ed*, 250 Mich. App. 419, 428-29; 648 NW2d 205 (2002). Upon reviewing the wording of the WDA, the Court of Appeals noted the following: "MCL 600.2921 provides, in part, that '[a]ctions on claims for injuries which result in death *shall not* be prosecuted after the death of the injured person except pursuant to [MCL 600.2922].' (Emphasis added). There having been no common-law right of recovery in [sic] the survivors of a person wrongfully killed, the sole source of rights in such a case is the WDA." *Jenkins* at p. 457 (citing *Courtney v. Apple*, 345 Mich. 223, 228; 76 NW2d 80 (1956); *Crystal v. Hubbard*, 92 Mich. App. 240, 243; 285 NW2d 66 (1979), *rev'd on other grounds* 414 Mich. 297 (1982). Furthermore, this Court, in *Courtney*, stated that "[t]he remedy under the death act . . . is exclusive, and the recovery of damages is necessarily limited to those specified by the [L]egislature and sustained by proofs." Id. Thus, according to this Court's holding in *Courtney*, a plaintiff is statutorily required to proceed with this action from wrongful-death damages in accordance with the WDA.

The Court of Appeals correctly examined the WDA and found that the Legislature's intent in enacting it was clearly and unambiguously to govern a medical-malpractice action involving death and the accompanying request for damages. The language of MCL 600.2922(1) is clear: the WDA

applies in the context of an action for medical malpractice when death is caused by the negligent act of another as found by a trier of fact. See *Miller v. Mercy Mem. Hosp.*, 466 Mich. 196; 644 NW2d 730 (2002). The WDA also directs a court or jury in all actions to "award damages as the court or jury shall consider fair and equitable . . . ." MCL 600.2922(6). Furthermore, the WDA also specifically includes "loss of society and companionship of the deceased." Id. With this in mind, the Court of Appeals noted the following:

> [t]herefore, standing alone, the WDA mandates recovery in any amount, limited only by the requirement that the amount be fair and equitable, for non-economic losses, including those for loss of society and companionship. . .the WDA clearly and unambiguously governs a medical-malpractice action involving death and the accompanying request for damages. This was clearly the Legislature's intent in enacting the WDA. Tort-reform legislation, which included the damages cap, did not result in any amendment of the WDA.

Jenkins at p. 457.

Noting its findings regarding the plain language of the WDA, the Court of Appeals then moved to Section 1483, and questioned whether the language in that statute clearly and unambiguously lead to the conclusion that it applies in a wrongful-death action. *Jenkins* at p. 458. The Court then noted that "[b]ecause the term 'death' is not specifically included in § 1483, it is necessary to discuss whether, by implication, the statute applies in a wrongful-death action, taking into consideration the actual words used and the context of that use. A cogent argument can be made that the lack of any reference to death in § 1483, in and of itself, leads to a conclusion that the statute is ambiguous or that it does not apply where death results from medical malpractice." *Jenkins* at p. 458. The Court then made the following finding:

> However, there is express language contained in § 1483 that indicates that it does not apply in wrongful-death actions. Non-economic loss is defined in the statute as meaning 'damages or loss due to pain, suffering, inconvenience, physical

> impairment, physical disfigurement, or other non-economic loss.' MCL 600.1483(3). Although the definition references 'other non-economic loss,' it does not specifically touch on loss of society and companionship, which are unmistakenly associated with a wrongful death action. MCL 600.2922(6); *McTaggart v. Lindsay*, 202 Mich. App. 612, 616; 509 NW2d 881 (1993)(claims for loss of society and companionship address compensation for the destruction of family relationships that results when one family member dies). Therefore, we must determine whether 'other non-economic loss' was meant to cover damages associated with loss of society and companionship, or in other words losses related to wrongful death.

Jenkins at pp. 458-459.

Next, the Court of Appeals correctly applied the doctrine of ejusdem generis to find that the damages listed in § 1483 relate to damages sustained by a surviving plaintiff and not damages sustained by a next of kin in a wrongful death action. *Jenkins* at pp. 459-460. Appellant argues that the Court is only allowed to resort to the doctrine of ejusdem generis where the plain language of a statute is not evident, making the statute ambiguous. *People v. Jacques*, 456 Mich. 352, 354; 572 NW2d 195 (1996). This is clearly a case where ambiguity exists as to the wording and application of a particular statute. A plain reading of § 1483 does not logically lead to the conclusion that the Legislature clearly intended the loss of society and companionship to be included in non-economic damages covered by the cap. The Court of Appeals thus correctly concluded that the application of the doctrine of statutory construction known as ejusdem generis was appropriate in this matter. Under this doctrine, the Court of Appeals noted:

> Here, damages or loss due to pain, suffering, inconvenience, physical impairment, and physical disfigurement clearly relate to damages sustained by an individual surviving plaintiff rather than damages sustained by next of kin in a wrongful death action who are represented by the personal representative. There is no specific mention of damages or losses unique to relatives of a person who has died, such as loss of society and companionship. There are at least four other statutes that we are aware of in which our Legislature has defined non-economic loss or damage as specifically including loss of society and companionship, MCL 600.2945, 600.2969, 600.2970 and 691.1416. However, the Legislature has not done so here. Loss of

> society and companionship verbiage has been included in case law dating back as far as 1899. *Lafler v. Fisher*, 121 Mich. 60; 79 NW 934 (1899). We can only conclude that the examples of non-economic losses specifically enumerated in § 1483 are not of the same kind, class, character, or nature as those associated with a wrongful-death action. Therefore, under the doctrine of ejusdem generis, 'other non-economic loss" as used in § 1483(3) does not refer to non-economic losses relating to wrongful-death actions.

Jenkins at pp. 460-461. Taking all of this information into account, the Court concluded that the Legislature intended the WDA to exclusively govern all wrongful-death claims as expressly stated within the statute, including the awarding of non-economic damages, and that the Legislature did not intend the cap on medical malpractice lawsuits to limit damages in wrongful-death, medical malpractice cases. *Jenkins* at p. 461. The Court also *correctly* noted that the legislative history sheds no light on the issue of whether the cap applies to the WDA, *Jenkins* at p. 461 (n8), and that the only legislative intent that is relevant in construing a statute is the intent of the actual Legislature responsible for enacting the statute. *Jenkins* at p. 461 (citing *Columbia Assoc., LP v. Dep't of Treasury*, 250 Mich. App. 656, 686, n 9; 649 NW2d 760 (2002)).

Moreover, the Court of Appeals correctly recognized that the Legislature is presumed to be aware of all existing statutes when enacting a new statute. *Walen v. Dep't of Corrections*, 443 Mich. 240, 248; 505 NW2d 519 (1993). With this in mind, the Court then found the following:

> Presuming that the Legislature was aware of the damage-award provisions of the WDA, it was incumbent on the Legislature to include some language in § 1483 to specifically indicate its intent that the damages cap applied in wrongful-death actions in order to avoid any conflict. Keeping this presumption in mind, the failure to so indicate reasonably leads to the conclusion that the legislative intent was to exclude wrongful death actions from the ceilings contained in § 1483, especially where no change was simultaneously made to the WDA to reflect a limit on damages. If we were to conclude that the damages cap controlled, it would result at best, from a plaintiff's standpoint, in a recovery limited to $500,000; an amount equal to the limit on damages recoverable for some injuries short of death. Without specific direction from the Legislature, ***we are not prepared to say that the Legislature intended to***

place an equal or lesser value on a person's life.

Jenkins at p. 461 (emphasis added).

In its application of the doctrine of ejusdem generis, the Court of Appeals correctly concluded that the cap on medical malpractice actions in § 1483 does not apply to the WDA. The language of § 1483 is ambiguous at best (as far as application to the WDA), and in such situations, courts (as the Court of Appeals did) must engage in an analysis of Legislative intent and statutory interpretation. Because the Court of Appeals correctly analyzed and construed both the WDA and § 1483, this Court should affirm its finding.

3. Furthermore, in her concurring opinion, Justice Kelly wrote separately to underscore her correct reading of the plain language of the WDA as *precluding* the application of MCL 600.1483 in this matter.

Justice Kelly wrote a separate concurring opinion to better effectuate her strong feelings against application of Section 1483 to the WDA. While she agreed with both the majority and the Appellant that if a statute is clear, no further analysis is necessary or permissible, her plain reading of the WDA was such that the WDA is the sole and exclusive remedy for wrongful death claims. (Kelly, J., concurring at p. 464). Justice Kelly specifically cited and emphasized MCL 600.2921 in its relevant part:

> Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person *except pursuant to the next section*. If an action is pending at the time of death the claims may be amended to bring it under the next section. A failure to so amend will amount to a waiver of the claim for additional damages resulting from death. [Emphasis added.]

MCL 600.2921. Justice Kelly then appropriately pointed out that here, plaintiff had no other course of action other than to file suit pursuant to the WDA because of the above wording, and further, she noted that "[t]he WDA contains the substance, procedures, and the exclusive measure of damages

in an action brought against one whose action or inaction has caused the death of another." (Kelly, J., concurring at p. 464). Justice Kelly also referred to MCL 600.2922(6) (as was done in the majority opinion) to conclude that in consideration of the plain meaning and purpose of the WDA, "it is clear that plaintiff's action is governed by the specific provisions of the WDA. By its exclusive provisions, it provides that there is no limit to non-economic damages arising from such claims." Id. (emphasis added).

Justice Kelly also correctly found that the damages cap does not list any damages specific to wrongful death claims. (Kelly, J., concurring at p. 465). She noted that other than Section 1483's term "other non-economic loss," the list of specified damages only refers to damages that are sustained by an injured person, and not those damages available to those who survive a deceased family member. Id. She continued to state:

> [i]t also makes no reference to estates or decedents' survivors because obviously an estate could not bring an action for damages under the damages cap. I agree with the majority's analysis under the doctrine of *ejusdem generis*, but would also apply that of *expressio unius est exclusio alterius*. According to this doctrine, the express mention in a statute of one thing implies the exclusion of other similar things. . . Thus, the Legislature's express mention of injuries of varied severity, specific to claims brought by living medical malpractice claimants precludes the conclusion that the general term 'other non-economic loss' includes losses attributable to a different and discrete set of wrongful death claimants.

(Kelly, J. concurring at p. 465). Additionally, Justice Kelly noted that the WDA, in contrast to Section 1483, specifically lists damages that are unique for wrongful death claims. Id. at n2.

As correctly noted by Justice Kelly, as further evidence that the damages cap in Section 1483 is not applicable to actions brought under the WDA, the Legislature does, in fact, have knowledge of existing laws and is presumed to have considered the effects of any new laws on all previously existing legislation. *Walen v. Dept. of Corrections*, 443 Mich. 240, 248; 505 NW2d 519 (1993).

Based upon this premise, Justice Kelly went on to state that "[i]n light of the fact that the Legislature is presumed to have knowledge that the WDA provides for additional damages in wrongful death claims and the fact that it rejected the opportunity to list death as an injury subject to the damages cap, the inescapable conclusion is that the damages cap does not apply...." (Kelly, J., concurring at p. 466).

Furthermore, as has previously been noted, the existence of the Product Liability Cap Act (PLCA), MCL 600.2946a, furthers the contention that if the Legislature had intended the cap on medical malpractice actions to apply to the WDA, then the Legislature would have expressly stated this intention, as it did in the PLCA, which identified death as one of two injuries that qualifies for the second tier of that cap:

> In an action for product liability, the total amount of damages for non-economic loss shall not exceed $280,000.00, *unless the defect in the product caused either the person's death* or permanent loss of a vital bodily function, in which case the total amount of damages for non-economic loss shall not exceed $500,000.00.

MCL 600.2946a(1) (emphasis added). Relying on the fact that in a similar situation, the Legislature went out of its way to include death within the statute to reflect that a cap did apply, while in the case of Section 1483 the Legislature chose not to include similar language, Justice Kelly concluded that "[w]hile the legislature is clearly aware that death is a possible injury in medical malpractice claims just as in products liability claims, it chose not to identify it as an injury subject to the damages cap." (Kelly, J., concurring at p. 466).

4. Because the WDA has a different scope and aim than Section 1483, the Appellants argument that the two rules should be read in *pari materia* fails.

If a statute merely or incidentally refers to the same subject as another statute, it is not *in pari materia* as long as its scope and aim are clear and unrelated. *Feld v. Charles Beauty Salon*, 435

Mich. 352, 360 (1990). Justice Kelly, analyzing the purpose of the damages cap as discussed recently by the Michigan Court of Appeals (*Zdrojewski v. Murphy*, 254 Mich. App. 50, 80 (2002) (holding that the purpose of the cap was to control increases in health care costs by reducing liability of medical care providers, resulting in reduced malpractice insurance premiums), concluded that in contravention of the Appellant's claims, the WDA specifically relates to claims brought by a decedent's survivor's and estate. (Kelly, J., concurring at p. 466). Justice Kelly then referred to *O'Neil v. Morse*, 385 Mich. 130, 133 (1971), where that court noted, "[t]he obvious purpose of the [WDA], originally enacted as PA 1848, No 38, is to provide an action for wrongful death whenever, *if death had not ensued*, there would have been an action for damages." Based on the evidence at-hand, Justice Kelly correctly concluded that there is no reason to consider the WDA and Section 1483 together. (Kelly, J., concurring at p. 466).

Justice Kelly further noted that since the WDA lists damages that are specific to wrongful death claims, to apply Section 1483 caps to wrongful death damages would render MCL 600.2922(6) nugatory; a result that Justice Kelly would not permit, nor should this Court. Id. In contrast, a reading of the WDA to apply wrongful death actions arising from medical malpractice would not render the plain language of Section 1483 nugatory. Justice Kelly stated:

> Although the damages cap applies "[i]n an action for damages alleging malpractice," our conclusion that the WDA applies in wrongful death claims does not rob this language of its full force. The damages cap still applies "[i]n an action for damages alleging malpractice" in which the injuries and damages are those listed in the statute.

Id. at p. 467. For all of the reasons stated in the Court of Appeals ruling in this matter, and those found in addition by Justice Kelly, her concurring opinion also rejected the Appellant's argument that since death is no longer included as an exception to the damages in Section 1483, the Legislature

must have intended the statute to apply to death claims. Id. She noted, "[t]his argument must be rejected because it goes behind the plain meaning of a statute that is clear and unambiguous. It could just as well be argued that the Legislature eliminated the death exception because it was already provided for under the WDA, thus rendering a death exception redundant." Id. at p. 467.

IV THE PROVISIONS OF MCLA 600.1483 ARE UNCONSTITUTIONAL

A. THE PROVISIONS OF MCL 600.1483 VIOLATE THE TRIAL BY JURY GUARANTEE OF THE MICHIGAN CONSTITUTION

Article I, Section 14 of the 1963 Michigan Constitution provides as follows: "The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. In all civil cases tried by 12 jurors, a verdict shall be received when 10 jurors agree." This provision is the same as Art II, Section 13 of the 1908 Constitution except for the second sentence, which permits a 10 juror verdict in civil actions. For causes of action that existed at the time Michigan adopted its Constitution, the right to trial by jury is generally absolute. *State Conservation Dept v Brown*, 335 Mich 343, 55 NW2d 859 (1953). The narrow and limited exceptions to this general rule include waiver and resolution of legal issues which do not involve factual disputes. *Prentis v Michel*, 368 Mich 182, 118 NW2d 34 (1962); *Kroes v Harryman*, 352 Mich 642, 90 NW2d 444 (1958). Statutes enacted by the Michigan Legislature may not abridge or whittle away this traditional trial by jury right. *State Conservation Dept.* 335 Mich. at 346; *People v Bicrere*, 297 Mich 58, 72, 297 NW 70 (1941). The right to trial by jury inures to new causes of actions that emerge which are similar in character to causes of action already or traditionally governed by jury trials. *State Conservation Dept*, 335 Mich at 346.

One specific cause of action that the Michigan Supreme Court has held confers a right to trial

by jury is personal injury caused by a Defendant's negligent tort. *Leary v Fisher*, 248 Mich 574, 227 NW 767 (1929). Therefore, a party alleging medical malpractice is entitled to a trial by jury.

"The basic premise of the jury system is that the court states the law to the jury and that the jury applies the law to the facts as the jury finds them." *People v Lewis*, 6 Mich App 447; 149 NW2d 457 (1967). This basic premise is embodied in MCR 2.516(B) (3). Thus, a Plaintiff has the right to have the jury accurately instructed on the applicable law. *Bowen v Nelson Credit Centers Inc*, 137 Mich App 76; 357 NW2d 811(1984). In addition, when the jury finds in favor of a party, it is its duty to assess damages in accordance with the evidence. *Zielinski v Harris*, 289 Mich 381; 286 NW 654 (1939); *Zinchook v Turewycz*, 128 Mich App 513; 340 NW2d 844 (1983).

The law contemplates that the jury will award a full recovery for non-economic loss an the basis of its instructions and the evidence. The Legislature has usurped this responsibility of the jury by implementing a law that says a victim of medical malpractice shall not be awarded compensation for non-economic damages in an amount that exceeds what the Legislature, ignorant of the facts of the case, has already determined to be the fixed limit on compensation.

A Washington state court case is instructive on this point. In *Sofie v Fibreboard Corp*, 112 Wash 636, 771 P2d 711 (1989), the Washington Supreme Court invalidated an identical law under which, "The jury goes about its normal business and the judge reduces, according to the statute's formula and without notifying the jury." The court noted that in Washington, the measure of damages is a question of fact within the jury's province, and that the jury's role in determining non-economic damages is perhaps even more essential. Id. at 717. The statutory scheme was held to be unconstitutional, because it denied litigants an essential function of the jury: "The legislature cannot in this manner intrude into the jury's fact finding function of determining damages." Id. at 719.1

As in *Sofie, supra*, the Michigan Legislature's use of such an unusual and imprudent scheme of nullification of a jury's fact finding function of determining damages violates the trial by jury guarantee of the Michigan Constitution. Therefore, MCL 600.1483 and its implementing section, MCL 600.6304(6), should be declared unconstitutionally invalid.

B. THE PROVISIONS OF MCL 600.1483 VIOLATE THE MICHIGAN CONSTITUTION'S SEPARATION OF POWERS BETWEEN THE JUDICIARY AND THE LEGISLATURE.

The Michigan Legislature's method of achieving reduced jury verdicts also violates the Michigan Constitution's separation of powers between the judiciary and the legislature and the principle of judicial independence guaranteed by our Constitution, Article VI, which establishes and defines the judicial branch of our state. The right of access to the court is a fundamental right. *Gale v Providence Hospital*, 118 Mich App 405 (1982). The statutory scheme of capping non-economic damages for medical practice victims, with its bizarre implementing section, also impinges on this fundamental right by denying medical malpractice victims true access to the jury system.

Other cases where the Michigan courts have held unconstitutional legislative attempts to prescribe rules of practice and procedure include: *Bielecki v United Trucking Service*, 247 Mich 661; 226 NW 675 (1929) (prohibition on court's directing a verdict on the issue of contributory negligence); *Harker v Bushouse*, 254 Mich 187; 236 NE 222 (1931) (prohibition on any reference to insurance in damages action invalid, since naming insurance company may become necessary on voir dire); *Jeanette v Stadium Management Co*, 117 Mich App 240; 323 NW2d 308 (1982) (statutory conclusive presumption which purportedly attaches to Employment Relations Commission's findings where defendant has failed to file timely petition for review cannot divest Court of Appeals of its inherent judicial power to assure that Commission's findings of fact are supported by record prior

to issuance of order enforcing the Commission Is decision); and *In the Matter of Tondu Energy Systems*, 173 Mich App 647; 434 NW2d 648 (1988) (legislative provision that contract approved by Public Utilities Commission is valid even though the Commission's order is subsequently held invalid unless order was stayed within 30 days of its entry).

These precedents teach that judicial nullification of an otherwise proper jury verdict violates the judicial article and the separation of powers doctrine in four respects. One, it imposes a mandatory duty on the judge to reduce the verdict to the amount of the cap, and does not allow for the exercise of judicial discretion. Two, it prohibits the judge from instructing the jury on the law in accordance with MCR 2.516(B)(3), and so is inconsistent with a judicially-adopted court rule. Three, it regulates a matter of procedure, which is within the sole province of the judicial branch, by prohibiting counsel from advising the jury of the cap. Four, it constitutes a legislative remittitur.

It is, therefore, inconsistent with the proper exercise of judicial power for the legislature to mandate that the judge reduce the jury verdict to the amount of the cap. This statutory requirement is a purely ministerial act that allows for no discretion. Under the judicial article of the Michigan Constitution, Section 1483 and its implementing section, 6304(6), are unconstitutional.

The statutory cap also violates the separation between the judiciary and the legislature because it constitutes a legislative remittitur. Remittitur involves two judicial functions. First, a judge must decide that a jury award is excessive. *Crippen v Chatterton*, 244 Mich 451, 221 NW 68 (1928). Second, the judge must offer the plaintiff an option between accepting a remitted award or re-trying the case with regard to damages. *McDonald v Smith*, 139 Mich 211, 102 NW 668 (1905). *Hartough v Safe-way Lines, Inc.*, 288 Mich 703, 288 NW 307 (1939).

Since the court already has a mechanism to perform the function of checking and correcting

excessive jury verdicts, a legislatively imposed procedure for doing so violates the doctrine of separation of powers. The caps, quite simply put, are duplicative of remittitur.

The Washington Supreme Court in *Sofie, supra*, distinguished judicial remittitur from the automatic legislatively-imposed "remittitur" [more accurately, jury nullification] that was provided for in the statute. It suggested that legislatively imposed "remittitur" might violate separation of powers, but did not find it necessary to decide that point. When the judge orders remittitur, this is the result of a case-by-case determination that the jury's finding of damages in the particular case was unsupported by the evidence. In addition, in cases of remittitur, the opposing party has the choice of accepting the reduction or seeking a new trial. Id. at 721.4.

When court rules or existing judicial procedural mechanisms are duplicated by legislative acts, as explained above, the court rules and procedures always prevail.

In summary, the manner in which the legislature chooses to implement a change in the substantive law is as much a matter of constitutional concern as the substantive law itself. The legislature cannot, consistent with the constitutional guarantees of the judicial article, create a procedural facade to bypass an otherwise proper jury verdict.

C. THE PROVISIONS OF MCL 600.1483 VIOLATE THE EQUAL PROTECTION CLAUSE OF THE MICHIGAN CONSTITUTION.

The right to recover damages for personal injuries, while not a fundamental right, is nonetheless a very important individual right. Whenever the legislature limits the right of some classes of personal injury victims to obtain full compensation for their injuries while allowing other classes of personal injury victims to obtain full compensation for their injuries, it has established a legislative classification that seriously impinges on this important individual right.

Legislative classifications are subject to challenge under the equal protection clause of the Michigan Constitution, Article I, Section 2. A classification is violative of equal protection when it is arbitrary and not reasonably related to the advancement of a legitimate governmental interest. *Doe v Michigan Department of Social Services*, 439 Mich 650; 487 NW2d 166 (1992); *Blue Cross and Blue Shield of Michigan v Milliken*, 422 Mich 1; 367 NW2d 1 (1985); *Shavers v Attorney-General*, 402 Mich 554; 267 NW2d 72 (1978); *Manistee Bank v McGowan*, 394 Mich 655; 232 NW2d 636 (1975); *Reich v State Highway Department*, 386 Mich 617; 194 NW2d 700 (1972). The cap on recovery of damages for non-economic loss imposed on victims of medical malpractice by MCL 600.1483 is arbitrary in that it discriminates against medical malpractice victims who suffer catastrophic non-economic loss in two ways. First, and most importantly, it discriminates between victims of medical malpractice who suffer catastrophic non-economic loss and other tort victims who suffer catastrophic non-economic losses that are not capped. The favored group includes tort victims who suffer uncapped catastrophic non-economic losses, since they receive full compensation. The disfavored group is medical malpractice victims suffering catastrophic non-economic loss who, because of the cap, do not receive full compensation for their non-economic losses.

Victims of medical malpractice, unlike victims of premises negligence, defects on highways, drunken drivers, and the like, are being treated differently. If a drunk driver negligently causes the loss of a leg, the victim can recover whatever damages for pain and suffering the jury deems fair and just. If a drunk physician negligently causes the loss of a leg, the plaintiff's recovery of non-economic loss is capped.

The most severely injured are those who are least adequately compensated. Caps not only frustrate the compensation goal of the system, but they detract from its equity.

In determining whether the classification is reasonably related to the advancement of a legitimate governmental interest, the Michigan Supreme Court utilizes a test of objective reasonableness. In evaluating a legislative classification in terms of its objective reasonableness, the courts look to the facts on which the legislature purportedly relied in making the classification. The courts determine: (1) whether the facts indicate that the classification was made for a legitimate purpose, and (2) if so, whether those facts support the conclusion that the classification will succeed in accomplishing that purpose. Where the facts clearly show that the classification was not made for a legitimate purpose or that the classification will not succeed in accomplishing the purpose for which it was purportedly made, the classification is objectively unreasonable.

It takes only a glance at the provisions of Section 1483 to undo the presumption of constitutionality and to place in question whether the purpose for which the classification was purportedly made is a legitimate one, and whether it will advance the purpose for which it was purportedly made.

Assuming that the government has a legitimate interest in assuring the availability of medical malpractice insurance at reasonable rates, this still begs the question of whether that interest can be reasonably and constitutionally fostered by compelling one small segment of citizens, catastrophically injured malpractice victims, to underwrite the cost of reducing these insurance premiums. Why should those most economically ill-favored victims of medical malpractice shoulder a greater economic hardship so that others more economically secure (health care providers and their insurers) may reap a financial benefit from the lower cost of premiums? To what extent can the legislature engage in a program of social engineering to advance the economic interest of one group of citizens, health care providers and their insurers, at the expense of depriving another group of

citizens of their right to recover compensation for injury as determined by a jury rather than by a legislative body? Even granting that the legislature has broad authority over social-economic policies and that the courts, properly, should be reluctant to interfere with legislative decisions affecting these policies, the courts are still the guardians of fundamental constitutional principles and are obligated to intervene when, in the guise of shaping social or economic programs, the legislature simply goes too far and infringes upon the basic constitutional rights of individuals.

The legislature could just as easily attempt to achieve its goal of lowering rates by arbitrarily capping the damages recoverable by housewives, retired persons, and/or unemployed individuals (who, it just so happens, are the persons most directly harmed by these limitations since their recovery of damages for economic losses is often negligible). In both instances, however, the Legislature's classification is violative of the constitutional guarantee of equal protection of the laws.

Consider, for example, *Reich v State Highway Department*, 386 Mich 617 (1972), another case in which laws that discriminate between similarly situated tort victims have been struck down as violative of equal protection. In *Reich*, the Supreme Court struck down a law that required persons suing governmental agencies for defects in the highways to give notice of their claim to the agency within 60 days after being injured. Observing that no such notice requirement was required for nongovernmental tort feasors, the Supreme Court found that this provision violated equal protection:

> "This diverse treatment of a class along the lines of governmental or private tort feasors bears no reasonable relationship under today's circumstances to the recognized purposes of the act. It constitutes an arbitrary and unreasonable variance in the treatment of both portions of one natural class and is, therefore, barred by the constitutional guarantees of equal protection." 386 Mich at 623. (emphasis added)

The court refused to find justification for disparate treatment between some victims of

negligence and others based solely upon the identity of the tort feasor, i.e. private or governmental.

Reich says that it is not reasonable to treat victims of private tort feasors and victims of governmental tort feasors differently. Here the question is whether it is reasonable to treat some victims of some private tort feasors differently than other victims of other private tort feasors. *Reich* compels a finding that it is not.

Still even more objectively unreasonable is the classification between medical malpractice victims that allows some victims to recover more damages for non-economic loss depending on a combination of the consequences of the injury and the mechanism of the injury. It is not possible to even hypothesize a purportedly legitimate purpose for this classification between classes of victims of medical malpractice. It is patently arbitrary and unreasonable.

All that the cap does then is to advance the constitutionally impermissible purpose of giving medical care providers and their insurers a "windfall" from liability for catastrophic non-economic loss at the expense of the victims in those relatively few cases where they will suffer such a loss.

The Michigan Legislature has made a political decision to prefer the interests of health care providers over the interests of victims of medical malpractice. It has denied victims who have suffered catastrophic non-economic loss as a result of medical malpractice the right to recover full compensation for their loss. In so doing, the Michigan Legislature has transgressed the limits on legislative power imposed by the Michigan Constitution in three ways. First, the statutory scheme for capping damages for non-economic loss in medical malpractice cases violates the trial by jury guarantee of the Michigan Constitution. Second, the statutory scheme imposed by MCL 600.1483 violates the Michigan Constitution's separation of powers between the judiciary and the legislature, and the principle of judicial independence guaranteed by our Constitution. Third, the capping of

damages recoverable for non-economic loss by victims of medical malpractice has created a classification between victims of medical malpractice and other tort victims that is not rationally related to the advancement of any legitimate governmental interest, and so violates the constitutional guarantee of equal protection of the laws.

D. THE APPLICATION OF MCL 600.6098.

In addition to the arguments concerning the constitutionality of applying Section 1483 to wrongful death claims, there is an additional, key point which this Court should take into account. In MCL 600.6098, specifically subsection (1), the Legislature states the following:

> (1)A judge presiding over an action alleging malpractice shall review each verdict to determine if the limitation on non-economic damages provided for in Section 1483 applies. If the limitation applies, the Court shall set aside any amount of non-economic damages in excess of the amount specified in Section 1483.

MCL 600.6098 (emphasis added). Here, the legislature's use of the word "if" is demonstrative that the limitation on non-economic damages does not always apply in an "action alleging medical malpractice." MCL 600.1483. This subsection, along with the fact that the legislature omitted reference to death in the medical malpractice cap statute while simultaneously mentioning death in the product liability cap statute evidences that the legislature did not intend for the caps on medical malpractice actions to apply to actions involving a claim of wrongful death.

The Appellant will likely argue that the legislature mistakenly forgot to amend or repeal MCL 600.6908 and that it should thus be disregarded by the Court. However, this Court expressly rejected a legislative mistake, also known as a "legislative befuddlement" in its holding in *Robinson v. City of Detroit*, 462 Mich. 439 (2000). It has always been the policy of this Court to avoid correcting any legislative mistakes, and that such mistakes should be corrected or made only by the legislature. In

conclusion, MCL 600.6098(1) provides a very strong textualist argument that the medical malpractice caps do not apply in wrongful death actions. This Court should not engage in judicial activism by usurping the power of the Legislature.

V IF THIS COURT WERE TO APPLY THE LOWER CAP FOR NON-ECONOMIC DAMAGES UNDER MCL 600.1483 TO CASES OF MEDICAL MALPRACTICE RESULTING IN DEATH, ESPECIALLY UNDER CIRCUMSTANCES WHERE A PATIENT WOULD OTHERWISE HAVE FALLEN WITHIN THE SPECIFICALLY ENUMERATED CATEGORIES IN MCL 600.1483, SUCH AN APPLICATION WOULD VIOLATE THE EQUAL PROTECTION CLAUSE OF THE MICHIGAN CONSTITUTION, CONST. 1963, ART I, § 2.

There is no dispute that MCL 600.1483 establishes two tiers of limitations on non-economic damage awards in medical malpractice cases. A careful reading of the statute indicates that should this Court determine that the statute applies to actions brought pursuant to the WDA, then it would necessarily follow that a decedent's claim would be limited to the lower of the two tiers. The statute is specific with respect to those cases in which damages for non-economic loss are subject to the second tier or higher cap damage limit. Since death is not included, it follows logically that a death claim would be subject to the smaller cap.

The application of the lower tier to a death claim would produce an absurd result. Death is certainly the ultimate and most severe form of damages. It would therefore be ludicrous and absurd to place a lower limit on damages in death cases than in several other classes of claims that do not result in death. Yet, that is where the Defendants-Appellees' argument logically leads.

The Defendants-Appellees' interpretation of MCL 600.1483 produces an additional legal incongruity in that it would subject death cases to the lower of two medical malpractice caps while such claims would simultaneously qualify for the higher of the two products liability caps under the

plain wording of MCL 600.2946a. Since there is nothing to distinguish the losses sustained by survivors of a fatal victim of medical negligence with those suffered by survivors of one killed by a defective product, a categorical diminution in the value of the former group's damages is logically unwarranted and legally indefensible. Such a classification is violative of the Equal Protection Clauses contained in Michigan's Constitution. See Const. 1963, Art. I, § 2.

In order to consider the wide array of constitutional problems that would be sparked should this Court choose to hold § 1483 to be applicable to the WDA, it is necessary to examine holdings coming from other jurisdictions on similar issues. In 1987, the Alabama Legislature enacted both a $400,000 cap on non-economic losses in medical malpractice cases and a $1,000,000 cap on punitive damage verdicts in wrongful death medical malpractice cases. Ala. Code §§ 6-5-544(b) and 547 (1987). In 1991 the Alabama Supreme Court struck down the $400,000 cap as violating Alabama's constitutional right to trial by jury, as well as Alabama's constitutional guarantee of equal protection. *Moore v. Mobile Infirmary Association*, 592 So2d 156 (Ala, 1991). In 1995 the same Court struck down the $1,000,000 cap on punitive damages in wrongful death actions in a very strongly worded opinion. *Smith Estate v. Schulte*, 671 So 2d 1334 (Ala, 1995).

In *Smith*, the jury returned a verdict of $4,500,000. As required under the new statute, the trial judge reduced the verdict to $1,000,000 and plaintiff appealed. The Supreme Court reversed, holding the cap to be unconstitutional. The Court held that the right not to be deprived of "fatal malpractice" was fundamental, and therefore applied a standard of strict scrutiny, holding that the $1,000,000 cap violated the equal protection guarantee of the Alabama Constitution.

The Utah Supreme Court offers a similar line of guidance for this Court to recognize. In *Condemarin v. University Hospital*, 775 P2d 348 (Utah, 1989), the Utah Supreme Court recognized

that those state courts which have applied a rational basis test in examining the application of damages caps to wrongful death cases have deferred to the legislative judgment that the classification is rationally related to a legitimate state interest. The Court noted, "[i]n stark contrast ... when the intermediate level test is applied, the courts are willing to scrutinize the basis for the legislative decision to limit damages far more closely." Id. At 359. The Court concluded that "[t]he practical difference is that under the rational basis test the statute will surely be found constitutional while the opposite result is likely if the intermediate test is applied. At any rate, the crucial issue in such cases remains which standard of review the Court chooses to apply." Id.

Utah's state Constitution (like the Michigan Constitution) requires "uniform application" of all laws of a general nature, and as such, the Utah Supreme Court applied the mid-tier heightened scrutiny test in considering whether the Utah Government Immunity Act (setting caps in medical malpractice actions against government hospitals) violated **both** the equal protection clause and the due process clause of the Utah Constitution. The court found that "[t]he recovery cap created a distinction between victims of governmental tort-feasors, depending on the severity of their injuries: the mildly injured received all; the moderately injured, most; and the severely injured, only a fraction or none of their economic and/or non-economic damages." Id. at 353.

The previous two cases can be used as a model for this Court to follow. Both the Alabama and Utah Supreme Courts, in the cases above, have demonstrated that where disparate economic classifications are created by caps on damages, a heightened scrutiny standard of review should be applied. Furthermore, the Alabama Supreme Court held that where such classifications affect fundamental rights, such as the right to recover damages for fatal malpractice, a **strict scrutiny** (emphasis added) standard of review must be applied. In applying Michigan's case to that in

Alabama, this Court should note several factors: First, Alabama's Constitution does not contain an equal protection clause, similar to that of Michigan. Yet, the Alabama Supreme Court inferred equal protection guarantees from "the Preamble to the Constitution of the United States; the Declaration of Independence; and the principles upon which this nation was founded. . ." *Moore v. Mobile Infirmary Assoc.*, 593 So.2d 156, 170 (Ala, 1991). However, **unlike** the state of Alabama, the Michigan Constitution of 1963 does contain an express equal protection clause. Const. 1963, art. 1, § 2. Therefore, this Court should find application of the principles of the Alabama Supreme Court even easier and within the bounds of the Michigan Constitution.

Plaintiff-Appellee urges this Court to review *Best v. Taylor Machine Works*, 179 Ill. 367; 689 NE2d 1057 (1997), which Plaintiff-Appellee believes to be persuasive. In *Best*, the Illinois Supreme Court struck down an Illinois law that imposed caps on compensatory damages for non-economic injuries, in part because it constituted an unconstitutional "special legislation" under the Illinois Constitution.

In finding that the cap on non-economic damages was arbitrary, the *Best* Court identified as an area of concern: (1) the limitation on non-economic damages distinguishes between slightly and severely injured individuals; (2) this limitation arbitrarily distinguishes between individuals with identical injuries; and (3) it arbitrarily distinguishes between types of injuries. Id, 1075.

The application of a wrongful death claim to the lower tier of Section 1483 would produce a result which makes absolutely no sense. The decedent's estate in a medical malpractice claim would be limited to an amount of damages lesser than a decedent's estate would be in a products liability claim. Such an application would frustrate this Court's duty and to hold otherwise would be to ignore this Court's admonition that "statutes should be construed so as to prevent absurd

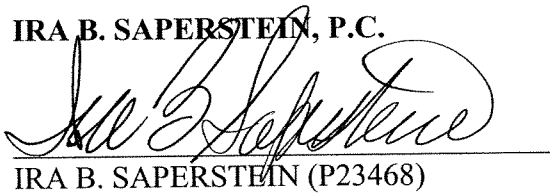
results, injustice or prejudice to the public interest." *McAuley v. General Motors Corp.*, 457 Mich 513, 518 (1998).

RELIEF REQUESTED

The Plaintiff-Appellee respectfully requests that this Honorable Court affirm the Judgment of the Trial Court in the amount of Ten Million ($10,000,000.00) Dollars, and declare that such verdict cannot be reduced because it was supported by the evidence, not excessive, not subject to the provisions of MCLA 600.1483, or because MCLA 600.1483 is unconstitutional or, if constitutional, it does not apply to actions brought pursuant to the Wrongful Death Act.

Respectfully submitted,

IRA B. SAPERSTEIN, P.C.

By: 

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DATED: March 22, 2004

STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
(Murphy, P.J., Cooper and Kelly, J.J.)

MARGARET JENKINS, as Personal Representative of the ESTATE OF MATTIE HOWARD, Deceased,

Plaintiff-Appellee,

-vs-

JAYESH KUMAR PATEL, M.D. and COMPREHENSIVE HEALTH SERVICES, INC., a Michigan corporation d/b/a THE WELLNESS PLAN, jointly and severally,

Defendants-Appellants.

Supreme Court No. 123957

Court of Appeals No. 233116

Wayne County Circuit Court
No. 98-808834-NH

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PROOF OF SERVICE

TAMMY BOLTON, says that on March 22, 2004, she mailed two (2) copies of **BRIEF ON APPEAL BY MARGARET JENKINS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MATTIE HOWARD, DECEASED**, by properly addressing an envelope to **Wilson A. Copeland, II, Esq.**, 3000 Penobscot Bldg., Detroit, MI 48226, (313) 961-2600; **Susan Healy Zitterman, Esq.**, One Woodward Avenue, Tenth Floor, Detroit, MI 48226-3499, (313) 965-7905; **Graham K. Crabtree, Esq.**, 124 West Allegan Street, Suite 1000, Lansing, MI 48933, (517) 482-5800; **Joanne Geha Swanson, Esq.**, 500 Woodward Avenue, Suite 2500, Detroit, MI 48226, (313) 961-0200; and **Michael J. Fraleigh, Esq.**, P.O. Box 30212, Lansing, MI 48909, (517) 373-1160, and by placing said envelopes in the U.S. Mail with postage fully prepaid.

I hereby certify that the above is true.

Tammy Bolton
TAMMY BOLTON